

Fall 2001

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Recommended Citation

Taylor, Richele Keel (2001) "God Bless the Kickoff: School Prayer in South Carolina in the Wake of Santa Fe v. Doe," *South Carolina Law Review*: Vol. 53 : Iss. 1 , Article 9.

Available at: <https://scholarcommons.sc.edu/sclr/vol53/iss1/9>

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GOD BLESS THE KICKOFF: SCHOOL PRAYER IN SOUTH CAROLINA IN THE WAKE OF *SANTA FE V. DOE*

I. INTRODUCTION

In *Santa Fe Independent School District v. Doe*¹ the Supreme Court held that student-led, student-initiated prayer before football games violates the Establishment Clause of the First Amendment. In spite of this holding, the familiar prayer, “Our Father who art in Heaven, hallowed be Thy name,” still echoes across some high school football fields.² In reaction to *Santa Fe*, many parents and students now initiate the Lord’s Prayer spontaneously at the beginning of football games,³ devising a voluntary prayer that could be difficult to challenge.⁴ Two groups known as “We Still Pray” and “No Pray, No Play” attempt to circumvent the Supreme Court’s decision with self-directed voluntary prayers said *en masse*.⁵ While voluntary prayer is a religious freedom guaranteed by the First Amendment,⁶ whether these prayers are truly voluntary or are in violation of the *Santa Fe* decision remains unresolved.

Although the Supreme Court held in *Santa Fe* that a school district’s policy allowing student-led, student-initiated prayer at football games was unconstitutional, this Note argues that enforcing this decision in South Carolina will be difficult. Despite *Santa Fe*, many South Carolinians believe this issue should be resolved locally, not by the courts, and may choose not to adhere to the Court’s decision. School districts across the state have reacted to the *Santa Fe* decision differently. Lexington School District 3 has already chipped away at *Santa Fe* by enacting a new school policy that attempts to assuage the local community while reasonably complying with the Court’s decision.⁷ The policy holds that students “have a constitutional right to lead public prayers [over a public address system] at

1. 530 U.S. 290 (2000).

2. David Firestone, *Football Faithful Rally to Preserve Pregame Prayers: Some Southerners Bypass School Officials to Pray, Circumventing Supreme Court Ruling*, THE STATE (Columbia, S.C.), Aug. 27, 2000, at A1; Judith Graham, *Under Texas’ Friday Night Lights, Prayer Tradition Will Continue*, THE STATE (Columbia, S.C.), Sept. 1, 2000, at A4.

3. Firestone, *supra* note 2, at A1.

4. See Steve Chapman, *Does Respect for the Law Have a Prayer? Lord’s Prayer and Scouts Get Hostile Reception*, CHI. TRIB., Aug. 31, 2000, § 1, at 23. But see Amy Geier, *Schools Seek Way Around Pregame Prayer Ruling*, THE STATE (Columbia, S.C.), August 26, 2000, at A6 (explaining that some legal authorities feel voluntary prayer options could subject school districts to legal challenges).

5. See Chapman, *supra* note 4, § 1, at 23.

6. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

7. See Karen E. York & Ken Knelly, *Lexington 3 Votes to Still Have a Prayer: School Board Reaffirms Students’ Right to Pray Before High School Football Games*, THE STATE (Columbia, S.C.), August 12, 2000, at A1.

high school football games if they want to.”⁸ In other districts, the spectators have taken it upon themselves to circumvent the decision by voluntarily praying in unison at football games.⁹ Some school boards are becoming creative, such as the board in Searcy, Arkansas, which allowed a Christian group to hold prayers around the school flagpole before football games began.¹⁰

This Note discusses the repercussions of these actions and proposes that the Court’s decision ultimately effectuates no real change. In addition, this Note argues that in the Court’s eagerness to suppress the airing of religious activity in schools, it disregarded its own procedural precedents by invalidating Santa Fe School District’s new policy, devised as a result of the lower court decisions, before the new policy could be implemented. The Court ignored the school district’s attempt to compromise with all the students and, accordingly, the Court itself generated much of the current backlash against its decision.

Part II of this Note explains the events leading to the creation of the First Amendment. Part III analyzes the meaning of the Establishment Clause and the Free Exercise Clause embodied in the First Amendment. Part III also discusses the Founders’ initial cry for separation of church and state and reviews the Supreme Court’s first challenge to the First Amendment. Part IV discusses the history of school prayer and the Supreme Court’s rulings, while Part V analyzes the decisions of the lower courts that heard the *Santa Fe* case. Part VI argues that some Southern states are not likely to comply with the Supreme Court’s decision. Part VII concludes that the Court was too dogmatic in its decision and should have given more credibility to the Santa Fe School District’s attempt to compromise.

II. HISTORY BEHIND THE FIRST AMENDMENT

Fear stemming from the interaction of church and government led to the creation of the First Amendment as part of the Bill of Rights.¹¹ A dominant idea of going to church and “[c]ustoms [such as] days of prayer and thanksgiving appeared not so much matters of religion as part of the common coin of civilized living.”¹² Most Americans assumed they lived in a Protestant country where the government would uphold commonly agreed upon morals.¹³ Supporters of the First Amendment

8. *Id.*

9. *See Few Prayers Heard at Texas High School Game*, THE STATE (Columbia, S.C.), Sept. 2, 2000, at A4; *see also* Firestone, *supra* note 2, at A1 (referring to high school football games where students have stood up in unison to pray before the game began).

10. *See* Firestone *supra* note 2, at A1.

11. THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 194 (1986) (explaining that many supporters of the Constitution accepted the Bill of Rights in order to “ease the minds of those who feared the powers of the national government” and to stop the allegations that the Constitution would threaten religious freedom).

12. *Id.* at 218.

13. *Id.* at 219.

wanted to prevent a national religion while still allowing states to “deal with religious establishment and aid to religious institutions as they saw fit.”¹⁴

Actual establishment of churches varied from colony to colony, with colonies establishing either a local church, an Anglican Church, or a combination of churches.¹⁵ Notably, Anglican Churches curtailed religious liberty more often than the other established churches.¹⁶ After the American Revolution, Anglican power was dispersed, allowing some states to break away from established churches.¹⁷

With the defeat of Great Britain, the idea of “disestablishing” churches affiliated with Great Britain developed into a movement for religious freedom.¹⁸ This argument came from dissenters and members of smaller religious sects who found Great Britain’s implementation of a tax supporting established churches unfair.¹⁹ The goal was to end public funding of religion. Not everyone agreed that a First Amendment was needed, but many voted for it in order to assure the ratification of the Constitution.²⁰ Although the First Amendment supports disestablishment, it was many years before the issue of public support for religion came before the Supreme Court.

III. THE FIRST AMENDMENT

The First Amendment of the Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”²¹ The Supreme Court construed the first part of this phrase, the Establishment Clause, to mean that the government may not promote a common religion or encourage citizens to participate in a particular religion.²² The latter part, known as the Free Exercise Clause, compels the government to accommodate citizens’ religious choices.²³ The Framers of the Constitution did not state what they intended the word “establishment” to convey, but many of the states’ constitutions included a similar clause from which one can deduce a meaning.²⁴ In the state constitution clauses, the word establishment was associated with “preference,” meaning that the state government should not prefer one form of religion over another.²⁵

14. ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 15 (1982).

15. CHESTER JAMES ANTIEAU ET AL., *FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES* 2 (1964).

16. *Id.*

17. *Id.* at 30.

18. *See id.*

19. *Id.* at 31-32.

20. *See* CURRY, *supra* note 11, at 194.

21. U.S. CONST. amend. I.

22. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

23. *See Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963); CORD, *supra* note 14, at 15.

24. ANTIEAU ET AL., *supra* note 15, at 132.

25. *Id.*; *see also* CORD, *supra* note 14, at 5 (noting that the government may not prefer one religion over another).

The theory of separation of church and state is not found directly in the First Amendment. The phrase came about in 1802 when Thomas Jefferson responded to concerns of the Baptist Association of Danbury, Connecticut about "majoritarian religion's tyranny in Connecticut."²⁶ Jefferson commented that "the legislative powers of the government [should] reach actions only, and not opinions" about religion.²⁷ Jefferson then averred that the "act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,'"²⁸ built a "*wall of separation between church and State*."²⁹ Thus the metaphor of separation of church and state was created and, it is often referred to even though it is not part of the Constitution.

The first challenge to the First Amendment occurred in *Everson v. Board of Education*.³⁰ In *Everson*, a taxpayer challenged a law requiring the payment of taxes in support of what he deemed religious activity.³¹ A New Jersey statute allowed school districts to decide how children would be transported to and from school.³² The Township of Ewing's school board decided it would reimburse parents who paid for public transportation to transport their children to parochial schools.³³ The Supreme Court held that the Establishment Clause forbade a state tax in support of religious activities or institutions, stating that state and federal governments could not "pass laws which aid one religion, aid all religions, or prefer one religion over another."³⁴ However, the Court upheld the New Jersey statute allowing the state to reimburse bus fares to the parents of Catholic school students stating that "[s]tate power is no more to be used so as to handicap religions than it is to favor them."³⁵

The Court in *Everson* determined that states could act on behalf of religious groups to a certain extent,³⁶ but did not define the limit of this extent in its decision. Thus, the controversial issue of where the separation should be drawn is still a matter of debate in today's courtrooms.

IV. SUPREME COURT DECISIONS AFFECTING PUBLIC SCHOOLS AND PRAYER

The Supreme Court has been deliberate in its adjudication of prayer-in-school cases over the past forty years, limiting its decisions to the immediate issue being argued. In 1962, in *Engel v. Vitale*, the Supreme Court decided that the recitation

26. ROBERT S. ALLEY, WITHOUT A PRAYER: RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS 36 (1996).

27. *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (confirming that the Free Exercise Clause within the First Amendment does not allow violations of state marriage laws in order to practice polygamy).

28. *Id.*

29. *Id.* (emphasis added).

30. 330 U.S. 1 (1946).

31. *Id.* at 3-4.

32. *Id.* at 3.

33. *Id.*

34. *Id.* at 15.

35. *Id.* at 18.

36. *Everson*, 330 U.S. at 18.

of a school prayer at the start of each class day was impermissible because it amounted to “a religious activity.”³⁷ The Court held that the Establishment Clause prohibited the government from composing prayers for persons “to recite as part of a religious program carried on by government.”³⁸ One year later, in *School District v. Schempp*,³⁹ a similar issue came before the Court. In *Schempp*, a Pennsylvania school district mandated recital of passages out of the Bible at the start of each school day.⁴⁰ The Court held that this practice was a religious ceremony and was used to advance religion, thus violating the Establishment Clause.⁴¹

Following *Schempp*, in *Wallace v. Jaffree*, the Court held an Alabama statute that allowed a moment of silence in public school for the express purpose of meditation or voluntary prayer unconstitutional on the grounds that the statute endorsed religion.⁴² However, it was the inclusion of voluntary prayer, not the time set aside for meditation, that caused the violation.⁴³

Subsequently, the Court held in *Lee v. Weisman* that schools could not sponsor prayers such as invocations and benedictions at public school graduation ceremonies where objecting students were compelled to participate.⁴⁴ However, the Court noted that “[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself [be] inconsistent with the Constitution.”⁴⁵

In *Bown v. Gwinnett County School District*, the Eleventh Circuit permitted a moment of silence in Georgia’s public schools.⁴⁶ The court upheld the Georgia Moment of Quiet Reflection in Schools Act as distinct from the school-sponsored prayers at issue in *Lee* because the Act made clear that prayer was not mandated while simultaneously creating an opportunity for those who wished to voluntarily pray at school.⁴⁷ However, the case was not appealed, making it unclear if the Supreme Court would find Georgia’s statute to be unconstitutional.⁴⁸

These cases and others serve as a prelude to the crucial decision in *Santa Fe Independent School District v. Doe*,⁴⁹ the most recent Supreme Court case dealing with prayer in schools. The Court limited its decision to whether a school district’s

37. *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

38. *Id.* at 425.

39. 374 U.S. 203 (1963).

40. *Id.* at 205.

41. *Id.* at 223.

42. *Wallace v. Jaffree*, 472 U.S. 38, 60-61 (1985).

43. *Id.* at 84 (O’Connor, J., concurring).

44. *Lee v. Weisman*, 505 U.S. 577, 599 (1992).

45. *Id.* at 598.

46. *Brown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464, 1474 (11th Cir. 1997).

47. *Id.*

48. Recently, the Fourth Circuit upheld a Virginia statute, § 22.1-280.3, amended in 2000, which requires the state’s public school classrooms to begin each school day with a moment of silence. *See Brown v. Gilmore*, 258 F.3d 265, 282 (4th Cir. 2001). This supplies South Carolina with a new avenue for encouraging voluntary prayer. *See Bill Robinson & Ken Knelly, Midlands Schools Districts Observing Minute of Silence: State-Mandated Quiet Moment Emerged as Part of Compromise in School Prayer Dispute*, THE STATE (Columbia, S.C.), Sept. 7, 2000, at B1 (explaining that South Carolina has a statutorily-mandated moment of silence at the beginning of every school day).

49. 530 U.S. 290 (2000).

policy permitting students to lead and initiate prayer at football games violated the Establishment Clause.⁵⁰ Holding that the policy did in fact violate the Establishment Clause, the Court said: "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."⁵¹

V. *SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE*

A. *The United States District Court for the Southern District of Texas*

In *Santa Fe Independent School District v. Doe*, students and their parents filed a complaint for injunctive relief and money damages under 42 U.S.C. § 1983, claiming that the Santa Fe Independent School District's policies violated the Establishment Clause of the First Amendment.⁵² The students and parents felt the practice of permitting student-led, student-initiated prayer before football games and at graduation ceremonies endorsed religion and thus violated the Establishment Clause.⁵³

The school district's graduation policy allowed the graduating class to decide if it wanted an invocation or benediction as part of its graduation.⁵⁴ If the students wanted a prayer, they were to elect whom they would like to deliver the prayer.⁵⁵ If the court enjoined this policy, the school district added a fall-back provision—the invocations and benedictions given would have to be nonsectarian and nonproselytizing according to the procedure established by an earlier Fifth Circuit case, *Jones v. Clear Creek Independent School District (Clear Creek II)*.⁵⁶

The district court determined that while the original policy was not appropriate, the fallback policy would be acceptable according to the standards set by the Fifth Circuit.⁵⁷ In addition, the district court mandated that the school district enact a policy to cover prayer for all school events and activities.⁵⁸ The school complied and adopted a policy covering football games that was basically the same as the graduation policy.⁵⁹

50. *Id.* at 301.

51. *Id.* at 312 (quoting *Lee v. Weisman*, 505 U.S. 577, 592 (1992)).

52. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 811 (5th Cir.1999), *reh'g denied*, 171 F.3d 1013 (5th Cir. 1999), *cert. granted*, 528 U.S. 1002 (1999), *aff'd*, 530 U.S. 290 (2000).

53. *Santa Fe*, 168 F.3d at 811.

54. *Id.*

55. *Id.* at 811-12.

56. *Id.* at 812; *see Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992).

57. *Santa Fe*, 168 F.3d at 813.

58. *Id.* at 812.

59. *Id.*

B. *The Fifth Circuit Court of Appeals*

Both parties appealed the district court's ruling to the United States Court of Appeals for the Fifth Circuit.⁶⁰ The school district asserted that requiring prayers to be nonsectarian and nonproselytizing at school functions was an erroneous decision and was not essential in order to make a school policy constitutional.⁶¹ The plaintiffs argued that the district court erred in "defining nonsectarian and nonproselytizing to permit reference to particular deities" and in allowing the school district to extend its written policy to football games.⁶² For the sake of simplicity, the Fifth Circuit addressed the appeal in the context of prayer at graduation ceremonies, although its decision applied to all policies concerning prayer, including prayer at football games.⁶³

The Fifth Circuit began with an explanation of the three tests established by the Supreme Court in Establishment Clause cases.⁶⁴ The first test discussed was the *Lemon* test, which holds a government policy unconstitutional if: "(1) it lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it excessively entangles government with religion."⁶⁵ The court then discussed the "coercion test" developed in *Lee v. Weisman*, stating that religious activity in a school is unconstitutional when "it has a coercive effect on students."⁶⁶ "[U]nconstitutional coercion [occurs] when: (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectives."⁶⁷ Finally, the court presented the "endorsement test," which questions whether a government entity manifests favoritism or a preference for a religion.⁶⁸ Before analyzing whether the school district's policies passed these tests, the court reviewed the Supreme Court's decision in *Lee v. Weisman* and the Fifth Circuit's decision in *Clear Creek II* for guidance.⁶⁹

In *Lee v. Weisman*, the Supreme Court denied schools the right to invite a religious official to give an invocation or benediction at graduation, even if the message is nonsectarian and nonproselytizing, where objecting students "are induced to conform."⁷⁰ The Fifth Circuit attempted to follow this decision in *Clear Creek II*, which concerned a graduation policy that allowed "student-selected, student-given, nonsectarian, nonproselytizing invocation and benediction at a high

60. *Id.* at 813.

61. *Id.*

62. *Id.* at 814.

63. *Santa Fe*, 168 F.3d at 814 n.7 (stating that for "simplicity and clarity [the Fifth Circuit] address[es] [the school district's] arguments only as they relate to graduation ceremonies," but that the "analysis applies with equal, if not greater, force to the Football Policy.").

64. *Id.* at 814.

65. *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

66. *Id.* at 814 (citing *Lee v. Weisman*, 505 U.S. 577, 590-594 (1992)).

67. *Santa Fe*, 168 F.3d at 814 (quoting *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 970 (5th Cir. 1992)).

68. *Id.* at 815 (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989)).

69. *Id.*

70. *Lee*, 505 U.S. at 599.

school graduation ceremony. . . .⁷¹ The Fifth Circuit clarified that the policy in *Clear Creek II* was deemed constitutional because it required invocations and benedictions to be nonsectarian and nonproselytizing; by contrast, Santa Fe Independent School District's policy merely contained a fall-back provision forcing prayers to be nonsectarian and nonproselytizing.⁷² The court then proceeded to analyze the Santa Fe school district's policy by incorporating the three tests mentioned above and in light of the *Lee* and *Clear Creek II* decisions.⁷³

The court first examined the *Lemon* test's three prongs and determined that the Santa Fe School District's policy did not meet the first prong which requires that a government practice must have a secular purpose.⁷⁴ The school district did not want to change its policy to encourage nonsectarian and nonproselytizing prayers, but only proffered a fall-back provision as a concession if the court would not accept the original policy.⁷⁵ Likewise, the policy failed the *Lemon* test's second prong prohibiting a policy from endorsing a religion because when prayers are sectarian and proselytizing, the effect is an endorsement of religion by the government.⁷⁶ The court then stated that the policy also violated the "endorsement test" because it appeared that the government was supporting one religion over another.⁷⁷

Finally, the court explained that the Santa Fe school policy is not analogous to the policy that the court upheld in *Clear Creek II*. The *Clear Creek II* policy was constitutional because the prayers were not delivered by clergy and were nonsectarian and nonproselytizing.⁷⁸ The court thus found it unnecessary to address whether Santa Fe's policy violated the "coercion test." The court restated the view that "sectarian and proselytizing prayers are by their very nature designed to promote a particular religious viewpoint rather than solemnize an otherwise secular event"⁷⁹ The court thus considered all three tests in illustrating that under no circumstances would this school policy be permitted.

The final argument that the Santa Fe School District advanced was that the policy created a "limited public forum" protected under the Free Speech Clause of the First Amendment.⁸⁰ The Fifth Circuit rejected this claim, stating that a public forum exists only when the government intends to give the public the right to indiscriminately use the forum.⁸¹ Since the school district limited the extent of use and did not give speakers "free reign to address issues, or even a particular issue,"

71. *Santa Fe*, 168 F.3d at 815. See *Jones*, 977 F.2d at 968-72.

72. *Santa Fe*, 168 F.3d at 815.

73. *Id.* at 816.

74. *Id.*

75. *Id.* at 816-17.

76. *Id.* at 817.

77. *Id.* at 818.

78. *Santa Fe*, 168 F.3d at 818.

79. *Id.*

80. *Id.* at 818-19.

81. *Id.* at 819-20.

the controlled forum was not a limited public forum.⁸² Accordingly, striking down student-led, student-initiated sectarian and proselytizing prayers did not violate the school district's freedom of speech.⁸³

The Fifth Circuit upheld the district court's opinion that nonsectarian and nonproselytizing prayers at graduation ceremonies were constitutional, but it held the extension of the policy to football games to be unconstitutional.⁸⁴ In briefly considering the expansion of the policy to football games, the court distinguished a graduation ceremony, which is a once-in-a-lifetime event, from a game which is held often and is therefore "less solemn."⁸⁵ The court found that even nonsectarian and nonproselytizing prayers at football games violated the Establishment Clause.⁸⁶

C. The Supreme Court

The Supreme Court granted a writ of certiorari to consider only whether "student-led, student-initiated prayer at football games violates the Establishment Clause."⁸⁷ The Court analyzed the issue under the guidelines established in *Lee v. Weisman*.⁸⁸ The Court stated that "'at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"⁸⁹ Ultimately, the Supreme Court affirmed the Fifth Circuit's decision that the school district's policy allowing student-led and student-initiated prayer at football games was unconstitutional.⁹⁰

The Court began its analysis by explaining that not every message delivered pursuant to a government policy, occurring on government property, and at a government-sponsored school-related event is considered the government's speech or government-endorsed speech.⁹¹ For example, in *Rosenberger v. Rector and Visitors of University of Virginia*, the Court held "that an individual's contribution to a government-created forum was not government speech."⁹² The "sticking point" in the Santa Fe School District's policy was that it did not incorporate all students

82. *Santa Fe*, 168 F.3d. at 820. The differences between the policy at issue in *Clear Creek II* and that in *Santa Fe* could not be obscured by the argument that a graduation ceremony is a public forum. As the court reminded Santa Fe, "[a]bsent feathers, webbed feet, a bill, and a quack, this bird just ain't a duck!" *Id.* at 822.

83. *Id.* at 822. The Fifth Circuit also noted that in *Clear Creek II*, it upheld the policy as constitutional because the prayers were nonsectarian and nonproselytizing. *Id.*

84. *Id.* at 822-23.

85. *Id.*

86. *Id.*

87. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 US 290, 301 (2000).

88. *Id.* at 302.

89. *Id.* at 302 (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (citations omitted)).

90. *Id.* at 317.

91. *Id.* at 302.

92. *Id.* (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995)).

indiscriminately, but rather allowed only one student to give an invocation for every game over the entire season.⁹³

Moreover, the policy of allowing the students to elect the person who would speak assured that students who held a minority belief would never have the opportunity to express their views.⁹⁴ The Court recalled the recent decision in *Board of Regents of University of Wisconsin System v. Southworth*, which held that student elections to determine which activities would get school benefits were problematic because the vote did not protect minority views.⁹⁵ In the Court's opinion, voting on one person to pray at football games effectuated the same scenario and provided "insufficient safeguards [for] diverse student speech."⁹⁶

Despite the school district's claim that students were making the decisions and that the district was not aiding the pregame invocation, the Supreme Court found that the district's involvement in the pregame prayer policy amounted to endorsement of religion.⁹⁷ Quite simply, the school district was involved because the board created the policy allowing students to give an invocation before a football game.⁹⁸ Furthermore, while the policy did not choose the words of the speaker, it required the statement to be "consistent with the goals and purposes of [the] policy" and to "solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."⁹⁹

The Court ascertained a religious meaning in the idea of solemnizing an event and with an invocation, which "primarily describes an appeal for divine assistance."¹⁰⁰ Moreover, because the invocation was at the school with the football team, cheerleaders, and band members sporting team logos and colors, the Court believed that the religious message was condoned by the school administration.¹⁰¹ The Court also felt that the history of the school policy indicated that it was an attempt to continue the earlier practice of having a "Student Chaplain" lead a prayer at football games.¹⁰² In sum, the Court perceived that a student representative delivering an invocation over the school's public address system, under the faculty's supervision, and according to school policy did not constitute private speech by an individual.¹⁰³

The second part of the Court's analysis centered on the district's argument that the football policy did not "coerce students to participate in religious

93. *Santa Fe*, 530 U.S. at 303-04.

94. *Id.* at 304.

95. *Id.* (citing *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000)).

96. *Id.* at 305.

97. *Id.*

98. *Id.* at 306.

99. *Santa Fe*, 530 U.S. at 306.

100. *Id.* at 306-07.

101. *Id.* at 308.

102. *Id.* at 309. Note that the Court did not consider that perhaps the district was trying to reach a compromise between students who relished this long-standing tradition and those who preferred the practice to cease.

103. *Id.* at 310.

purpose and perception of government establishment of religion.”¹¹⁶ The Court stated as follows:

The District . . . asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to “solemnize” a football game and that this single-student, year-long position is essential to the protection of student speech.¹¹⁷

The Supreme Court further asserted that “nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But, the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.”¹¹⁸ The Court concluded that because the school district’s policy was facially unconstitutional, the policy violated the Constitution even before it took effect.¹¹⁹ Hence, the Supreme Court upheld the Fifth Circuit’s decision that implementing a nonsectarian, nonproselytizing policy for football games violated the Establishment Clause.¹²⁰

VI. THE PRAYER CONTINUES

As is apparent from the First Amendment, the Founding Fathers supported freedom of religion.¹²¹ However, they also supported government aid and the encouragement of various religious establishments.¹²² Historically, government has cooperated with religion in various ways, including allowing publically-owned lands to be used by religious faiths, publicly funding religious education institutions, providing tax exemptions to religious groups and their educational institutions, providing state aid in financing new churches by a lottery system, and hiring chaplains to read prayers in the legislatures, armed forces, and government conventions.¹²³ In fact, some states went even further and promoted statutes that created days of fasting and prayer and punished those who committed blasphemy.¹²⁴

While the Supreme Court made it abundantly clear that school endorsement of prayer will not be tolerated, some South Carolinians argue that it was the Santa Fe School District’s particular policy that was considered unacceptable and that other

116. *Id.* at 314.

117. *Santa Fe*, 530 U.S. at 315.

118. *Id.* at 313.

119. *Id.* at 314.

120. *Id.* at 317.

121. *ANTIEAU ET AL.*, *supra* note 15, at 62.

122. *Id.*

123. *Id.*

124. *Id.*

observances.”¹⁰⁴ The district asserted that because pregame messages were chosen by the students and attendance at a football game was voluntary, unlike a graduation ceremony, the policy was not coercive.¹⁰⁵ The Court refuted this view, citing its previous statements as to why this “circuit-breaker” theory did not convert public speech into private speech.¹⁰⁶ The purpose of the Establishment Clause is to remove religion from government control.¹⁰⁷ Requiring students to decide whether an invocation would be given and by whom it would be given created a division “along religious lines in a public school setting, a result at odds with the Establishment Clause.”¹⁰⁸ Moreover, although the *Sante Fe* students chose the speaker, the ultimate choice to have the election was made by the school district, a state government body.¹⁰⁹

The Court also declared that even though attendance at a football game was not required, extracurricular activities such as participation in the band, cheerleading, or playing on an athletic team did mandate certain students’ attendance.¹¹⁰ In addition, the Court realized that high school students would want to attend extracurricular events and would be pressured to go by their peers.¹¹¹ “[F]ootball games,” in the Court’s words, “are traditional gatherings of a school community,” a community that may not choose to start games with a prayer when some individuals within the community could be ostracized.¹¹² Furthermore, even if attendance were completely voluntary, a football game would still be a government-sponsored event.¹¹³ The Establishment Clause of the First Amendment therefore prohibited student-led, student-initiated prayer at these state-sponsored football games.¹¹⁴

The school district’s final argument to the Supreme Court was that the challenge to the policy concerning football games was premature because a student had not yet acted under the policy.¹¹⁵ However, the Court noted that an injustice could occur by the mere creation of a government-sponsored policy that “ha[d] the

104. *Id.*

105. *Santa Fe*, 530 U.S. at 310.

106. *Id.* In an electrical device, when all the connections are in place, a “circuit” is created and an electrical current occurs. If you “break the circuit” by removing one of the connections, there is no electrical current. Here, the district argues that because students *choose* to have a pregame message and students *are not forced* to attend an extracurricular activity, the messages are not public speech. The Supreme Court is stating that “choice” does not “break the circuit” of public speech; all of the correct connections exist for the pregame messages to be public speech.

107. *Id.*

108. *Id.* at 311.

109. *Id.*

110. *Id.*

111. *Santa Fe*, 530 U.S. at 311-12.

112. *Id.* at 312.

113. *Id.* at 312.

114. *Id.* at 313.

115. *Id.*

similar policies could survive constitutional scrutiny. Consequently, school boards have looked at their policies to see if changes should be made. School boards in South Carolina such as Richland District 1, Richland District 2, and District 5 of Lexington and Richland Counties did not have pregame prayers before the decision and are not adopting such a policy now.¹²⁵ Others are changing their policies to provide for a moment of silence or for the reading of a nonsectarian "sportsman's creed" instead of a prayer.¹²⁶ Although these boards are following the Supreme Court's authority, they do not necessarily agree with the ruling.¹²⁷ Harold Broome, the Cherokee County superintendent, stated the following: "We're going to follow the law, even though we don't agree with it. . . . Some members of area churches are probably going to stand up and recite the Lord's Prayer after the national anthem is played. The school has nothing to do with that."¹²⁸ A coach supported Broome's opinion, offering that there is "nothing you can do about [the Supreme Court's decision]" but follow it even when you do not like it.¹²⁹ Even the principal of Fairfield Central High School opined that he believed "97 to 98 percent of the people here believe the prayer should happen."¹³⁰

Despite these dutiful reactions, school prayer has ignited defiance in South Carolina as other school districts continue to support school prayer at football games notwithstanding the *Santa Fe* ruling.¹³¹ Notably, the Lexington School District 3 made headlines in 2000 because school board members passed a resolution by a 3-2 vote stating that "students have a constitutional right to lead public prayers [over a public address system] at high school football games if they want to."¹³² Threats of lawsuits have stemmed from the school board's controversial decision as citizens question whether the new policy is acceptable under the Supreme Court's ruling in *Santa Fe*.¹³³ One of the school board members who voted in favor of the policy mentioned that he did not vote against student's right to pray, just against the policy, which in his view violated the Supreme Court's decision.¹³⁴ Another board member who voted to allow the district's prayer policy contended that he voted for the policy to make sure schools knew they did not have to prohibit students from saying a prayer.¹³⁵

125. Ken Knelly, *Pregame Prayer Showdown Looms: Lexington 3 Meets Tonight to Review Decision Allowing Student-Led Prayer*, THE STATE (Columbia, S.C.), August 23, 2000, at A1 [hereinafter *Pregame Prayer*].

126. *Id.* at A10. A "sportman's creed" would be used to "extol[] the virtues of fair play and respect." *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. See Charles Colson & Bob McAlister, *Lexington District 3 Taking Stand*, THE STATE (Columbia, S.C.), August 23, 2000, at A15.

132. York & Knelly, *supra* note 7, at A1.

133. Shannon King, *Lexington 3 Prayer Policy May Prompt ACLU Suit*, THE STATE (Columbia, S.C.), Sept. 2, 2000, at B3.

134. See York & Knelly, *supra* note 7, at A1.

135. *Id.*

Many citizens of South Carolina, Texas, and other Southern states consider a prayer before a high school football game as much a matter of tradition as one of religion.¹³⁶ John Nex, head football coach at Gilbert Middle School in Gilbert, South Carolina, commented that prayers at football games are “sort of a tradition on Friday nights in small towns.”¹³⁷ Thus, many do not want to vote “against” prayer in school for fear of being ostracized. Evelyn Berry, executive director of the South Carolina School Boards Association, summed up the South’s situation when she stated that the Supreme Court’s ruling did not reflect the values of South Carolina school board members.¹³⁸ In fact, she felt the board was doing what many other boards desired to do.¹³⁹

In a vote by the National School Boards Association prior to the Supreme Court’s ruling, Texas and South Carolina both supported a referendum that would endorse prayer at football games.¹⁴⁰ Thus, the natural response from board members is to support local citizens’ (and probably their own) wishes to continue the prayer tradition. Lexington 3’s Batesburg-Leesville High School began the football season with the student body president saying a prayer over the public address speaker.¹⁴¹ The policy the school district first adopted after the Supreme Court’s ruling in *Santa Fe* stated as follows:

The board of trustees in Lexington School District 3, the district administration, teachers and staff shall not infringe upon any student’s right to speak religiously and to pray at school or school events. Lexington County School District 3 shall not prohibit a student from voluntarily delivering an invocation or prayer before a school event, including, but not limited to, football games and graduations. The use of the district’s sound system equipment by a student delivering such an invocation or prayer shall be permitted¹⁴²

While the aforementioned policy is different from Santa Fe Independent School District’s policy, it may be perceived as an endorsement of religion by the school board because prayers could be given over the public address system. The board voted to modify the policy after headlines appeared on the front page of every local newspaper.¹⁴³ The new policy “dropped specific references to ‘prayer’ and ‘invocations’ . . . but . . . left in a provision that protects a student’s right to ‘speak

136. See Reddie Burns & Karen York, *Court Ban on Prayer Upsets Many in S.C.*, THE STATE (Columbia, S.C.), June 20, 2000, at A1.

137. *Id.*

138. See York & Knelly, *supra* note 7, at A1.

139. *Id.*

140. *Id.* This measure was defeated and the National School Boards Association now endorses the Supreme Court’s ruling. *Id.*

141. See *Pregame Prayer*, *supra* note 125, at A1.

142. *Id.*

143. *Id.*

religiously or otherwise' at school events"¹⁴⁴ The board felt the policy was "defensible" because it was neither promoting nor prohibiting religion.¹⁴⁵ However, the policy could still be perceived by the Supreme Court as endorsing religion. Clearly, not all South Carolina citizens are willing to give in without a fight. One student told reporters that if the board refused to allow the students to pray over the public address system, they were going to "buy [their] own public address system," as they were determined to "get around" the decision.¹⁴⁶

The effect of these reactions underscores the Supreme Court's inability to resolve conflicts in a satisfactory way for the United States. The public acts as a majority, despite those who feel a pregame prayer supported by the government would infringe on their First Amendment rights.¹⁴⁷ These majority sentiments are likely even stronger in the South, where religion is a mainstay to the culture.

The judiciary has used its power to impose unpopular policies on an "unwilling majority" in recent years.¹⁴⁸ The courts can "use force freely and without consent" to decide "basic social and economic policies."¹⁴⁹ Lexington School District 3 is determined to fight what it perceives to be judicial overreaching, and has some support in this endeavor. In December of 2000, Representative Rick Quinn proposed that the state pay for the legal aid of school districts sued over policies allowing voluntary prayer at school events.¹⁵⁰ Quinn's bill, H.R. 3120, which currently has ten other sponsors,¹⁵¹ demonstrates that public support exists in South Carolina for frustrating the Supreme Court's decision.¹⁵² The Senate has shown its support as well in adopting a resolution on March 6, 2001, stating that it believes that "government policy or action to suppress prayer is tantamount to a law

144. Ken Knelly, *Prayer Still Has Board's Blessing*, THE STATE (Columbia, S.C.), Aug. 25, 2000, at A1.

145. *Id.*

146. *Id.*

147. This is seen in areas other than religion. During the presidential vote, some Americans called for a change in the electoral system so that the popular vote could determine the winner and, thus, the majority would rule. See Russ Tisinger, *Americans Want a Recount, Then a President*, Speakout.com, (Nov. 14, 2000) at <http://speakout.com/activism/news/1983-1.html> (last visited Oct. 31, 2001); see also *Hill and Bill Split on Electoral College*, at <http://www.lycos.com/news/flash/popularvote.html> (last visited Oct. 31, 2001) (noting that even former President Clinton and former first lady Hillary Clinton gave their opinions on whether there should be a change in the electoral system).

148. WILLIAM J. QUIRK & R. RANDALL BRIDWELL, JUDICIAL DICTATORSHIP 15 (1995).

149. *Id.* at 16.

150. H.R. 3120, 114th Leg., 1st Sess. (S.C. 2001); see also Ken Knelly, *State Defense of School Prayer Proposed*, THE STATE (Columbia, S.C.), Dec. 16, 2000, at B1. Note that if Quinn's proposed bill is ratified and approved by the Governor it will become § 59-17-150 of the South Carolina Code. H.R. 3120, 114th Leg., 1st Sess. (S.C. 2001). Not only will South Carolina pay legal costs for districts sued for having policies allowing voluntary prayer at school functions, but the costs associated with defending the policy may be recovered by the district from the opposing party. *Id.*

151. These sponsors are Representatives Walker, Simrill, Delleney, Altman, Barrett, Meacham-Richardson, Whatley, Sandifer, Robinson, and Merrill. H.R. 3120, 114th Leg., 1st Sess. (S.C. 2001).

152. See generally *id.* (discussing South Carolina's support for voluntary prayer at school events).

prohibiting the free exercise of religion and could, therefore, be unconstitutional.”¹⁵³ South Carolina evidently agrees with Chief Justice William Rehnquist’s dissent that the *Santa Fe* ruling “bristles with hostility to all things religious in public life.”¹⁵⁴

What will be the next opinion that many Americans refuse to support? Furthermore, what repercussions will Lexington School District 3 suffer if its policy is found unconstitutional? Laverne Neal, program director for the South Carolina American Civil Liberties Union, has already warned the district that her organization may sue because of the newly-adopted policy.¹⁵⁵ Neal believes the board is choosing to “mire [its] community in a battle [it] can’t possibly win.”¹⁵⁶ South Carolina’s Attorney General, Charlie Condon, also asked Lexington School District 3 to rescind the policy.¹⁵⁷ Thus, South Carolina is dividing over prayer and religion in the schools and is debating how the Supreme Court’s ruling should be enforced.

Interestingly, while citizens are divided over the issue of condoning student-led prayers at government-controlled events, no one contests various churches’ support of a local school. Six churches of various denominations pooled their resources to help Hand Middle School, in Columbia, South Carolina, by providing tutors, mentors, and activities for needy students.¹⁵⁸ Furthermore, this group of churches has joined with other agencies that are not religiously affiliated to obtain a grant from the government; this grant has been used to create a technology center for members of the community who need skills for better employment.¹⁵⁹ Thus, while the Supreme Court decries government support of religion, citizens are not challenging the government’s support of different religious groups who in turn aid the government in some way. Perhaps the government could learn from churches that there are ways to compromise.

Arguably, the Supreme Court forced a decision upon those who could have peaceably reached a compromise. Although the Santa Fe School District did not give in, it did amend its original policy by adding a fallback provision in an effort to compromise.¹⁶⁰ Furthermore, as Chief Justice Rehnquist’s dissent pointed out, the Court decided to ignore precedent in the ruling.¹⁶¹ While the Santa Fe School District was preparing to implement its new policy, the Court decided not to wait

153. S. Res. 401, 114th Leg., 1st Sess. (S.C. 2001).

154. See Colson & McAlister, *supra* 131, at A15 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 520 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting)).

155. See King, *supra* 133, at B3.

156. *Id.*

157. *Id.*

158. Janet G. Hudson, *Faith Agencies Can Work with Our Public School*, THE STATE (Columbia, S.C.), Dec. 26, 2000, at A11 (arguing that putting faith into action in ways other than public prayer allows churches and schools to be compatible).

159. *Id.*

160. See *supra* text accompanying note 59.

161. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting). Chief Justice Rehnquist argues that precedent was ignored when a policy that had not yet been tested was held unconstitutional. *Id.*

for the “inevitable” and instead invalidated the policy on its face.¹⁶² As the dissent points out, it is “conceivable” that the students would have voted not to have a prayer; thus, the policy should have been implemented before it was held unconstitutional.¹⁶³ Although a policy can be held unconstitutional on its face immediately after its enactment, the Court ordinarily waits for a violation to occur before it intercedes.¹⁶⁴

The Court failed to follow its own precedent when it refused to defer to the stated secular intent of the government-enacted provision.¹⁶⁵ The promptness with which the Court condemned the policy seemed to manifest bias by its members. Additionally, the untimely ruling has engendered turmoil in certain states such as South Carolina that believe such a personal decision should not be made by any court.

VII. CONCLUSION

In light of the Supreme Court’s decision, some Texas students tried to keep the tradition of prayer before football games alive. Around 200 out of a crowd of 4,500 exercised their right to begin a voluntary prayer.¹⁶⁶ However, the loudspeakers at the game drowned out the fans, confirming that prayer, whether voluntary or not, will not be heard before a Santa Fe High School football game.¹⁶⁷ Although voluntary prayer is allowed, and some schools were loudly heard,¹⁶⁸ it will not be condoned in any fashion by the Texas government.

South Carolina faces a choice as well. Already known for the controversial battle over the flying of the Confederate flag, it is possible that the state will make its way into the headlines again concerning another issue dear to the South. However, there is also the chance that no one will notice the disappearance of the pregame prayer over time, as our own loudspeakers drown out the initial enthusiasm for asserting one’s right to pray. The Supreme Court’s decision forces those who believe in beginning events with a prayer to separate their religious beliefs from any “state” events they choose to attend. One wonders if the Framers intended separation of church and state to extend this far.

Richele Keel Taylor

162. *Id.* at 319.

163. *Id.* at 320-21.

164. *Id.* at 318-19. The Chief Justice notes that the Court does not typically hold policies invalid on their face.

165. *Id.* at 322.

166. *See Few Prayers Heard at Texas High School Game*, *supra* note 9, at A4.

167. *Id.*

168. *See Firestone*, *supra* note 2, at A1.

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